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9 SPECIAL MASTER  
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12 UNITED STATES DISTRICT COURT  
13 NORTHERN DISTRICT OF CALIFORNIA  
14  
15

16 RENEE CONTRATTO, on behalf of  
17 herself and the general public,  
18

19 Plaintiff(s),  
20 vs.  
21

22 ETHICON, INC. et al., (dba  
23 GYNECARE WORLDWIDE), a  
24 New Jersey Corporation; JOHNSON  
25 & JOHNSON, a New Jersey  
Corporation; LIFECORE  
BIOMEDICAL, INC., a Florida  
Corporation; and DOES 1-25,

26 Defendant(s).  
27

28 CASE #: C03-3804 MJJ (BZ)  
JAMS Ref#: 1100043994

SPECIAL MASTER'S ORDER NO. 4:  
PLAINTIFF'S MOTION FOR  
SANCTIONS (Hrg. 7/8/05)

28 On July 8, 2005, plaintiff's motion for sanctions against Ethicon and Lifecor was heard by  
Special Master Martin Quinn by telephone conference call. Having considered all the argument  
submitted by the parties and reviewed all the documents in question, the Special Master orders as follows.

I. Relevant Facts

27 Plaintiff seeks sanctions for defendants' alleged failure to produce documents in accordance with  
28 a court order and repeated failures to produce documents on time. Plaintiff has filed four motions to  
compel production. Plaintiff claims she has been prevented from taking adequate depositions of fact  
witnesses, and inhibited in preparing her expert witnesses.

1 Plaintiff served her first Request for Production of Documents in November 2003. In June 2004,  
 2 she filed her first motion to compel. After a discovery conference with Magistrate Judge Zimmerman, on  
 3 July 26, 2004 defendants served supplemental responses (Kershaw decl., Exh. 1 & 2). After a further  
 4 delay in production, plaintiff served a second motion to compel in October 2004. After another hearing  
 5 before Magistrate Zimmerman, on November 9, 2004, the parties entered into a Stipulation re Production  
 6 of Documents and Order (Kershaw decl., Exh. 4), in which defendants agreed to produce documents in  
 7 accordance with a detailed schedule between October 2004 and January 2005. Once again delay ensued,  
 8 and defendants failed to produce all documents within the prescribed deadline (they produced 8,000 pages  
 9 over two months late). Defendants note that some of the delay was attributable to plaintiff's failure to pay  
 for copying charges.

10 Since the documents were produced with significant redactions, plaintiff served her third motion  
 11 to compel in April 2005. Defendants then advised the Special Master and plaintiff that they had imposed  
 12 an October 2003 cut-off date, and had not produced certain documents dated after 10/31/03. The Special  
 13 Master issued Special Master's Order #1, ordering defendants to produce unredacted copies of many of  
 14 the disputed documents and to produce post-October 2003 documents in certain categories. Pursuant to  
 15 this order, defendants have produced about 12,000 more pages.

16 The fourth dispute arose over Ethicon's privilege log of about 2,500 documents. The Special  
 17 Master ruled in June 2005 that a substantial number of a random sample of about 100 documents on the  
 18 log were not privileged.

19 Lifecor recently located and produced about 10,000 pages of documents.

20 Fact discovery closed on April 29, 2005. Expert reports were due June 24, 2005 and expert  
 21 depositions are now underway.

## II. Analysis

### A. The 10/31/03 Cut-off

22 Plaintiff's primary basis for sanctions is defendants' imposition of the October 2003 cut-off for  
 23 document production. Plaintiff argues that the 11/9/04 Order did not permit defendants to impose any  
 24 cut-off, that defendants never revealed to plaintiff or the court that they were imposing a unilateral cut-  
 25 off, and that subsequently produced documents dated after October 2003 are highly relevant and  
 26 important. Defendants accurately note that the 11/9/04 Order required them to produce only documents  
 27 that they had agreed to produce in their 7/26/04 supplemental responses – and that in those responses they  
 28 objected to producing documents dated after plaintiff's surgery in August 2002. Therefore, they argue  
 they have not violated any order or discovery obligation, and gave plaintiff and the court due notice of the  
 cut-off.

1       The Referee concludes, as he did in Special Master's Order #1, that defendants did not give  
 2 adequate notice to either plaintiff or the court that they were imposing a cut-off date. First, their objection  
 3 in the 7/26/04 supplemental responses was a general objection mixed in with boilerplate general  
 4 objections. Second, the objection referred to the date of plaintiff's surgery, and made no mention of an  
 5 October 2003 cut-off. Third, in at least two court appearances and several meet-and-confer sessions,  
 6 defendants evidently made no mention of the cut-off date. Fourth, defendants produced many documents  
 7 dated after plaintiff's surgery **and** after October 2003, so there was no way for plaintiff to glean that other  
 8 post-October 2003 documents had been withheld. The Referee concludes that the imposition of the cut-  
 9 off date was a violation of defendants' discovery obligations, and a violation of the spirit and intent – if  
 perhaps not the precise words – of the 11/9/04 Order.<sup>1</sup>

10      Defendants object that plaintiff has moved for sanctions instead of moving to produce further  
 11 documents, as suggested in Special Master's Order #1. They also argue the motion violates the Local  
 12 Rules because it is not timely. Neither argument is persuasive. At this stage, after four motions to  
 13 compel and production of documents perhaps still incomplete after 18 months, it is reasonable for a party  
 14 to seek sanctions. Moreover, plaintiff did notify the Special Master promptly of her intention to file this  
 motion, and then did so soon thereafter.

15      **B. Late Productions**

16      Plaintiff complains secondarily of routinely delayed document productions, and accuses  
 17 defendants of intentionally delaying production in order to inhibit plaintiff's ability to depose witnesses  
 18 and prepare her experts. It is undisputed that defendants produced 8,000 pages more than 2 months after  
 19 the January 2005 deadline in the 11/9/04 Order, and produced about 22,000 pages of documents after the  
 20 discovery cutoff in response to the Special Master's orders and as a result of Lifecor's recent discovery of  
 21 more documents. Defendants offer a series of excuses, ranging from plaintiff's failure to pay copying  
 22 charges, to change of Lifecor's counsel, to innocent failure to locate certain documents. Defendants also  
 23 deny that the late productions prejudiced plaintiff, noting that her counsel has made use of the late-  
 24 produced documents in depositions, and has demonstrated an ability to digest far larger numbers of  
 25 documents in short order.

26      The Special Master concludes that the late productions have prejudiced plaintiff's ability to  
 27 conduct thorough fact depositions. Although the Special Master does not find that the late productions  
 28 were intentional, they were due in significant part to defendants' assertion of improper objections, many

27      <sup>1</sup> Defendants note that in Special Master's Order #1 the Special Master declined to award sanctions, and found  
 28 that defendants' objections to producing documents "had sufficient merit to justify a judicial ruling." However,  
 that phrase related to the relevance objections defendants interposed to producing certain categories of documents,  
 not to the imposition of the 10/31/03 cut-off. Although the Special Master was restrained in characterizing that  
 cut-off, he believed then and believes now that it was wholly unjustified.

1 of which just barely escaped being sanctionable. Moreover, the Special Master's review of a sample of  
 2 the documents on Ethicon's privilege log leaves him with the uncomfortable feeling that many of the  
 3 logged documents may not in fact be privileged, and may need to be reviewed *in camera* and produced  
 even further down the road.

4       C.     Award of Sanctions

5       In summary, the Special Master does not have confidence that defendants' productions even now  
 6 have been complete and thorough. Moreover, the few documents redacted or withheld by defendants that  
 7 plaintiff has brought to the court's attention appear to the Special Master to be highly relevant and fully  
 discoverable (Kershaw decl., Exh. 7-10). It is clear that plaintiff is due some significant relief, and  
 8 therefore the Special Master will grant this motion and order a combination of sanctions in an effort to  
 9 redress any injustice.

10      First, the Special Master declines to impose terminating or evidentiary sanctions. Defendants  
 11 have a decent argument that they did not violate the express terms of the 11/9/04 Order, although it is  
 12 clear to the Special Master that they misled, perhaps inadvertently, both plaintiff and the court as to their  
 13 intentions. Also, their justifications for the late productions are at least plausible and prevent a finding at  
 this time that there has been a concerted plan to withhold or delay productions.

14      Second, defendants shall pay the plaintiff's attorneys fees incurred for bringing this motion, in  
 15 addition to 100% of the JAMS charges as required by the Order of Reference. The Special Master  
 16 declines to award plaintiff the costs of the prior motions to compel, because he was not involved in the  
 17 first two and he has already found that no sanctions are appropriate for the last two.

18      Third, defendants shall update all their document productions in all categories from October 2003  
 19 through April 29, 2005, the date of the close of fact discovery. Defendants make the valid point that an  
 20 order requiring them to update productions to the present would require a never-ending production, and  
 plaintiff has not shown at this time that documents generated after April 2005 would be relevant.

21      Fourth, plaintiff may reopen or notice up to three fact depositions for the sole purpose of  
 22 examining witnesses about documents produced after January 12, 2005, the deadline contained in the  
 23 11/9/04 Order. Defendants shall pay all reasonable travel costs incurred by plaintiff to take such  
 24 depositions. Such depositions shall be completed not later than August 15, 2005 absent a showing of  
 good cause.

25      Fifth, all parties shall supplement all prior discovery responses in accordance with Fed. R. Civ. P.  
 26(e).

27                   III.     Order

28      Accordingly, good cause appearing, it is ORDERED that plaintiff's motion for sanctions is  
 GRANTED IN PART:

1       1. Defendants shall pay the plaintiff's attorneys fees incurred for bringing this motion.

2 Plaintiff shall submit evidence of such fees within 10 days; defendants may submit any opposition within  
3 10 days thereafter. The Referee will determine the amount to be awarded without argument.

4       2. Defendants shall update all their document productions in all categories from October  
5 2003 through April 29, 2005. Absent a showing of good cause, defendants shall complete this document  
6 production within 30 days of the service of this Order.

7       3. Plaintiff may reopen or notice up to three fact depositions for the sole purpose of  
8 examining witnesses about documents produced after January 12, 2005. Defendants shall pay all  
9 reasonable travel costs incurred by plaintiff to take such depositions. Such depositions shall be completed  
not later than August 15, 2005 absent a showing of good cause.

10      4. All parties are ordered to supplement their responses to all prior discovery requests, both  
11 responses to written discovery and document productions not later than August 31, 2005. Leave to take  
12 further discovery as a result of such supplemental productions will be granted only upon a very  
compelling showing of good cause, actual prejudice and significant need.

13      5. The JAMS charges for the Special Master to hear this motion shall be paid 100% by  
defendants Ethicon and Lifecor.

14  
15      Dated: July 11, 2005



Martin Quinn, Special Master